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in the first degree, with a recommendation to mercy. The court directed the verdict to be entered without the recommendation, which on appeal was sustained, the court saying: "The recommendation was addressed solely to the court, and constituted no part of the verdict." See also *State v. O'Brien*, 22 La. Ann. 27 (1870); *State v. Bradley*, 6 Id. 560 (1851). So in *The State v. Potter*, 15 Kans. 303 (1875), the verdict as returned was "guilty of murder in the second degree," and with it these words, "and we recommend his punishment to be the least amount allowed by law." The court declined to receive the verdict in that form, and handed the jury another blank, which was duly signed and returned by them without those words. This was held no error.

2. But if the words "with mitigating circumstances" were a part of the first verdict, the defendant had of his own motion procured that verdict to be set aside, and therefore waived any benefit to be derived from it. Indeed there are respectable authorities that if a defendant on trial for murder is convicted only of manslaughter, and the verdict is set aside on his motion, he is liable on the second trial to be convicted of murder, and cannot complain at such a result, the consequence of his own motion. See *United States v. Harding*, 2 Wall. Jr. 127; *Livingston's Case*, 14 Gratt. 592; *State v. Stanton*, 1 Ired. 424; *State v. Commissioners*, Riley 273; *Morris v. The State*, 1 Blackf. 37; though this is not universally agreed to.

EDMUND H. BENNETT.

Court of Chancery of Delaware.

CHANDLER v. HOLLINGSWORTH ET AL.¹

A court of equity will protect a husband against a voluntary conveyance or settlement by his intended wife of all her estate, to the exclusion of the husband, made pending an engagement of marriage, without his knowledge, even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not.

The wife's right of dower will be protected against the voluntary conveyance of the husband made pending a marriage engagement under the same circumstances in which the husband is relieved against an ante-nuptial settlement by the wife.

Such a conveyance is not wholly void, so as to admit the wife to a share of the personal estate of the husband dying intestate or a child of the marriage to take the real estate as heir at law or the personal estate as distributee. The conveyance is valid to pass a title subject to the right of the wife in equity to her dower.

Distinction in this respect between a conveyance fraudulent in fact and one constructively fraudulent.

THIS was a bill to set aside a conveyance made in fraud of marriage. William Chandler, deceased, by deed executed three days previous to his marriage with the complainant, Elizabeth Chandler, conveyed all his estate, real and personal, upon certain trusts for his own benefit during his lifetime, and after his death to be divided

¹ This case, though decided in 1867, and frequently referred to as a leading case in Washburn on Real Property and other works, has never been published before.

between his three sisters. The bill was filed, after Chandler's decease, by his widow, Elizabeth Chandler, and William Chandler, an infant son, by his next friend, and charged that the conveyance was made pending an engagement of marriage, without the knowledge of the intended wife; that it was a fraud on her marital rights and void; that it was void not only so far as to entitle Mrs. Chandler in equity to dower of her husband's real estate, which but for the deed she would have taken at law, but that it was absolutely void, so that she was entitled to such share of his personal estate as but for the deed she would have taken in the result which followed, viz. : the death of William Chandler intestate; and further that a child born of the marriage was let into the same rights which but for the deed he would have held as heir at law of the real estate and distributee of the personal estate in the event which happened, *i. e.*, the intestacy of the father.

E. G. Bradford and *A. Higgins*, for the complainants.

William S. McCaulley, for the defendants.

BATES, Chancellor, after reviewing the evidence, expressed his opinion upon the questions of law arising out of the case, as follows :—

The case presented for relief is this—William Chandler three days before his marriage with the complainant, Elizabeth Chandler, while under an engagement of marriage with her made a voluntary conveyance of all his estate, real and personal, thereby, if it be allowed to operate, defeating the right of dower which otherwise would have accrued from the marriage, and also withdrawing from his own control the means he then had whereby provision might be made for his intended wife and the issue of the marriage, either through a will or by law in case of his dying intestate. This conveyance was made without notice to her, and as we must take it, without her knowledge derived in any way whatever before the marriage. Yet no misrepresentation as to his means appears; nor any positive deception as to what was done beyond simple non-disclosure. Nor are we to consider it as an element in the case that Mrs. Chandler before the engagement knew that Chandler had held this property or that she had formed any expectations with regard to it.

We may now take the legal questions presented by such a case. Will a court of equity relieve against a voluntary conveyance by

the husband of all his estate made pending an engagement; or, as the English cases term it, pending a treaty of marriage made without any disclosure to the intended wife or knowledge on her part, though without any express misrepresentation or deception practised by the husband? This is the general question; but it is to be considered in two forms:—

1. Will equity relieve, at least so far as to save to the wife her dower in the real estate, even though the conveyance must stand as it affects the personal estate and also the real estate, except as this may be subject to dower?

2. Will equity go further and set aside the deed *wholly*, thereby admitting to take effect the same consequences which would have followed if no such deed had been executed, so that as Chandler in fact died intestate the whole property shall descend or be distributed as in ordinary cases of intestacy?

Either form of relief will give Mrs. Chandler her dower. On the latter depends her claim to a share of the personal estate, and the claim on behalf of the infant complainant as heir at law and distributee.

I. Let us consider the first question. The English Court of Chancery has, from the earliest times, protected the marital rights of the *husband* against a fraudulent settlement by the wife pending a treaty of marriage. It is considered that he becomes a purchaser of the wife's property, in consideration of the charge he assumes of her maintenance and the payment of her debts; that this is a right upon which fraud may be committed and which ought to be protected. Lord THURLOW, in *Strathmore v. Bowes*, 1 Ves. Jr. 27. This view has commanded universal consent from the beginning. But until a recent date the doubt has been as to what circumstances should be held to render the settlement fraudulent; whether there must have been some misrepresentation or deception practised upon the husband, such as amounts to *actual fraud*, or whether mere non-disclosure was sufficient as a *fraud in law* to invalidate the settlement; especially whether mere non-disclosure should be fatal where the husband was at the time of the marriage ignorant as well of his wife's having held the property as of its having been disposed of away from him.

The first full examination of this subject was in *Strathmore v. Bowes*, decided in 1789. That was a bill filed by Bowes, the husband, to set aside a settlement made before marriage by his wife,

the Countess of Strathmore. There was also a cross-bill filed by the wife to set aside a deed revoking the settlement, on the ground of duress by the husband in obtaining it from her. First, upon an issue directed to inquire whether the deed of revocation was obtained by the duress, and a verdict so finding, that deed was set aside: 2 Bro. C. C. 345. Then, the cause came to be heard upon the bill to set aside the settlement, before Justice BULLER, sitting for the Lord Chancellor. He decreed in favor of Lady Strathmore. Upon a rehearing before Lord Chancellor THURLOW, the decree was affirmed; and, finally, it was affirmed again on appeal to the House of Lords. The argument before Justice BULLER and his opinion are reported in 2 Cox 28. The rehearing before the Lord Chancellor, with his opinion, are reported both in Cox and in 1 Ves. Jr. 22. Upon the rehearing the arguments are best reported in Vesey, but the opinion of Lord THURLOW in Cox. As a decision the case is of no importance upon the question before us, since the settlement made by Lady Strathmore was not a fraud upon the marital rights of her husband under any, the most liberal, construction of fraud. It was made before she knew Bowes, her future husband, even pending a treaty of marriage with another man and with his consent: and her marriage to Bowes was itself obtained by a gross fraud on his part. But the case is valuable as containing a full review of all the prior decisions. Justice BULLER considered that the decisions had gone only so far as to relieve the husband in cases of some actual fraud practised upon him, and he so lays down the rule. The result, he says, is "that if the wife is guilty of any fraud and holds out to the husband that there is nothing to interfere with his rights, then any deed executed by her in prejudice of such representation shall be void." Bare concealment he held not to be sufficient: 2 Cox 30. Lord THURLOW, though it did not affect the result of that case, seems to have held to the more liberal construction of frauds, which includes concealment as well as positive misrepresentation. In his opinion (1 Ves. Jr. 28), he says, "if a woman, during the course of a treaty of marriage with her, makes *without notice to the intended husband* a conveyance of any part of her property I should set it aside, though good *prima facie*, because affected *with that fraud*." It is true, according to Justice BULLER'S view, that the early decisions were upon cases of actual misrepresentation or deception, but it is also true that the distinct question whether bare concealment was itself fraud

had never before been raised ; and, therefore, the cases prior to that of *Strathmore v. Bowes* are to be considered rather as presenting examples of fraud, as they occurred in fact, than as deciding in what fraud on marital rights must consist so as to limit the construction of it. Lord THURLOW must so have regarded them in laying down his view of fraud in terms more comprehensive than Justice BULLER had done; embracing in his definition mere concealment, which Justice BULLER had expressly excluded. The later decisions in England and America have sanctioned the view of Lord THURLOW.

The first of these is *Goddard v. Snow*, 1 Russ. 485, decided by Lord GIFFORD, Master of the Rolls, in 1826. In that case the wife ten months before her marriage settled to her separate use for her life, and subject to her appointment after her death, two sums of money, 900*l.* in all, being not the whole of her estate. Her intended husband was ignorant both of her possession of the funds and of the settlement made of them, and so continued until after her death, when he filed his bill to set aside the settlement as one made in fraud of his marital rights. No actual misrepresentation was alleged, nor deception other than was implied in the concealment. Here the precise question was presented, whether bare concealment was in itself a fraud. In the argument and decision of this case *Strathmore v. Bowes* was fully reviewed and the opinions of Justice BULLER and Lord THURLOW considered. Concealment alone was held to be a fraud and the settlement was set aside.

Next, is a case in which the subject is considered by Lord BROUGHAM, though the decision went upon other grounds: *St. George v. Wake*, 1 Myl. & K. 610 (7 Eng. Ch. Rep.). Lord BROUGHAM raises the question and upon a review of the cases says that in none except *Goddard v. Snow* had there been a positive decision avoiding a settlement by the wife on the mere ground of want of knowledge by the husband. "Yet," he proceeds to say, "it is certain that all the cases in which the subject is approached treat the principle as one of undoubted acceptance in this court; and it must be held to be the rule of the court, to be gathered from a uniform current of *dicta* though resting upon a very slender foundation of actual decision touching the simple point." This was in 1833.

In *England v. Downs*, 2 Beav. 322 (27 Eng. Ch. Rep.) 1840, in which the question concerned the validity of a settlement made by a widow upon children of a former marriage before a second

marriage, the Master of the Rolls, Lord LANGDALE, considered it not sufficiently proved that the settlement was made *pending a treaty of marriage*; or, if so, *that it was concealed up to the time of the marriage*; and on these grounds he sustained the settlement; but he states the law quite fully on the point before us, and clearly in accordance with *Goddard v. Snow*, that mere concealment is sufficient to avoid an ante-nuptial settlement by the wife. He adds a qualification, not necessary to be here considered, viz., that the concealment is evidence of fraud rather than fraud *per se*, and therefore is open to explanation, so that cases may occur in which non-communication would not be held fraudulent.

Next is *Taylor v. Pugh*, 1 Hare 608 (23 Eng. Ch. Rep.) 1842. In this case a settlement made before marriage to the exclusion of the husband was sustained on the special ground that the husband had previously seduced the woman, thus putting her in a situation in which she must submit to a marriage without being able to stipulate for a settlement out of her own property. In his opinion the Vice-Chancellor, SIR JAMES WIGRAM, notices with strong disapproval the argument that to avoid such an ante-nuptial settlement by a wife without the intended husband's knowledge actual fraud or deception must be proved; and he cites as the true rule a statement from 2 Roper on Husband and Wife 162, that "deception will be inferred if after the commencement of the treaty for marriage the wife should attempt to make any disposition of her property *without her intended husband's knowledge* or concurrence."

It is true that the cases cited subsequent to that of *Goddard v. Snow*, give only the *dicta* of judges in support of the rule of that case; but they show, at least, a concurrent judicial opinion, from that case down, in favor of the rule which holds mere concealment to be at least evidence of fraud. The real doubt has been whether the concealment should in all cases *per se* avoid the settlement, or whether a settlement not disclosed to the husband might, nevertheless, be sustained upon such equitable considerations, as the meritorious character of the objects provided for, such as children of a former marriage: *Hunt v. Matthews*, 1 Vern. 408; *King v. Cotton*, 2 P. Wms. 675: so the poverty of the husband and his inability to make any settlement upon his wife: *King v. Cotton*, *supra*; *St. George v. Wake*, 1 Myl. & K. 610 (7 Eng. Ch. Rep.); so the fact that the settlement is of *part only* of the wife's property, which was the ground in *Demandville v. Crompton*, 1 V. & B. 352.

The only equitable consideration relied upon in the pending case was that Mrs. Chandler, as we must assume, had no knowledge that William Chandler had held the property in controversy ; and hence, the expectation of it could not have been an inducement to the marriage. But this circumstance is certainly immaterial. The true ground of relief is not *the disappointment of an expectation*, but *fraud upon a legal right*, that is, the right to a marriage without any secret alteration of the circumstances of the parties as they stood at the time of the engagement. The husband's ignorance of the property settled, though urged in *Goddard v. Snow* and *Taylor v. Pugh*, as a ground for sustaining the settlement, was expressly overruled and was disapproved in *England v. Downs*. In the latter case Lord LANGDALE says : " If both the property and the mode of its conveyance pending the marriage treaty were concealed from the intended husband, as was the case in *Goddard v. Snow*, there is still a fraud practised on the husband. The non-acquisition of property of which he had no notice is no disappointment ; but still his legal right to property actually existing is defeated, and the vesting and continuance of a separate power in his wife over property which ought to have been his, and which is without his consent made independent of his control, is a surprise upon him and might if previously known have induced him to abstain from the marriage." In *Taylor v. Pugh*, the same consideration was rejected by the vice-chancellor ; and he reasoned with great force, that no equitable considerations arising out of the circumstances of the particular case, such as those before referred to, shall excuse a concealment from the husband or sustain a settlement made without his knowledge.

In this country the ignorance of the husband of a settlement by the wife pending a treaty of marriage has of itself been uniformly held fatal to the settlement, though no actual misrepresentation or deceit might appear. The cases are collected in 1 White & Tudor's Leading Cases 317. See especially *Linker v. Smith*, 4 Wash. C. C. 224 ; *Tucker v. Andrews*, 13 Me. 124 ; *Logan v. Simmons*, 3 Ired. Eq. 487 ; *Spencer v. Spencer*, 3 Jones Eq. 404, 409 ; *Poston v. Gillespie*, 5 Id. 253 ; *Ramsay v. Joyce*, 1 McMullan Eq. 236 (in which latter case an issue was directed to the single question whether the husband *had knowledge* of the settlement) ; and *Manes v. Durant*, 2 Rich. Eq. 403. In North and South Carolina the whole subject of fraud on marital rights has

been examined in a series of cases contemporaneous with the later English decisions and without reference to them, but reaching the same conclusion, viz., that no ante-nuptial settlement by the wife can be valid if made without the husband's knowledge; it matters not how meritorious may be the objects provided for by the wife, or what may be the circumstances of the husband. He is considered as having rights springing out of the treaty of marriage, not to be controlled by any equitable considerations between the wife and third persons. And in North Carolina the result reached by frequent investigations of the subject has been to establish a rule requiring in order to sustain a settlement by the wife, not only that the husband have general knowledge of her intention to make one or that she has done so, but requiring his consent to the very act or instrument by which the settlement is made: *Spencer v. Spencer*, 3 Jones Eq. 409; *Poston v. Gillespie*, 5 Id. 262.

We see then that both in England and in this country since the decision of *Strathmore v. Bowes*, and the cases prior to it, the course of judicial opinion has tended more and more to strengthen the protection of marital rights against settlements made to their prejudice; (1st) by enlarging the ground of invalidity. This originally was only actual fraud, evidenced by positive misrepresentation or deceit; but now it includes also constructive fraud, such as arises from mere non-disclosure; and (2d) by excluding all the exceptions founded on equitable considerations in the particular case, which were originally allowed to support such settlements; thus making in all cases the husband's *knowledge at least*, and in some courts his *positive assent* essential to the validity of a conveyance or settlement made after an engagement to marry.

Now, wishing to lay down a rule only for the case presented, it is enough to say that this court will protect a husband against a voluntary conveyance or settlement by the wife of *all* her estate, to the exclusion of the husband, made pending an engagement of marriage, without his knowledge prior to the marriage, even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not. The concealment of what it is the right of the husband to know, and what it is the duty of the wife to disclose, is itself fraud in law. It is a doctrine of equity, not so fully developed at the date of *Strathmore v. Bowes* as now, that the concealment, to the prejudice of another party with whom one is dealing, of facts which if known to him

might affect his decision and which there is an obligation arising out of the transaction to disclose, is a fraud. It is so treated in equity without respect to the motive of the party in the concealment, being what is termed a *constructive fraud*. But, whether a conveyance or settlement made under the circumstances I have stated is *always* void, or whether it may be sustained upon such equitable considerations as were admitted in the earlier English cases, and in *St. George v. Wake*, 1 Myl. & K. 610, such as the reasonableness of its provisions as being made for children of a former marriage, or its embracing only a part of the wife's estate, or such as the husband's inability to make a settlement upon the wife, I leave as questions open in this state until they arise judicially.

We now reach a question which was discussed with much earnestness and ability on both sides. Will equity extend to the wife the like protection against an ante-nuptial conveyance by her husband which we have seen it affords to the husband against her?

After a patient examination of the argument and authorities I find no just ground of discrimination against the wife. First, dower is a *right of property*, and as such a proper subject of protection: indeed, a right above all other rights of property favored. Again, dower is a *marital right*, as well as is the husband's interest in the wife's property. Protection, maintenance and dower are the rights enuring to her from the marriage; and though her dower is inchoate only until the husband's death, it is none the less in his lifetime a legal right, vested and indefeasible except by her own act. This is so far recognised that a release of it by the wife is held a sufficient consideration to support a post-nuptial settlement upon her, and to make it available, if *bona fide*, against the husband's creditors: *Atherley on Mar. Sett.* (27 Law Lib.) 162; *Bullard v. Briggs*, 7 Pick. 533. Again, the wife is a *purchaser* of her marital rights: as much so as is the husband. She takes them for a consideration, rendered by her in the marriage, a consideration not indeed the same in kind as that rendered by the husband for his marital rights; but, considering all the consequences involved in marriage, what the wife surrenders is in value or measure more, certainly not less, than what she receives. She surrenders her person, her services, her self-control, her means of self-support; and as to property, far more than the interest she acquires. However, it should be said, that whether the wife's dower, as well as the husband's interest in her estate, is to be protected against fraud, depends not at all upon

such considerations as the comparative value of the consideration rendered by each, or the value of their respective rights, but solely upon the fact that there exists a *marital right*, which in common with all legal rights is a proper subject of legal protection, whether it be itself of more or less value, or whether it spring from a larger or less consideration rendered. If there could be any ground, in addition to the mere existence of a right defrauded, to evoke a swifter interposition for one sex rather than for the other, it would be the consideration that the wife, being of the weaker sex, the more needs legal protection.

It was argued by the defendants' counsel that in England dower is not protected as a marital right against a conveyance by the husband before the marriage, even though made on the eve of marriage and expressly to exclude the wife; that under the English decisions the husband and wife, in this respect, stand on a different footing. There is no decision upon the precise question; but the weight of opinion is in favor of the position taken. Prior to the Statute of Uses, estates were largely held in trust; and it was from the beginning considered that dower did not attach to a use, even when it was one reserved to the husband under a conveyance made by himself. Whether a conveyance with a use reserved to himself by the husband, made on the eve of marriage and with the express purpose of barring dower, was at that period held to be effectual does not appear by any decided case. The case *Ex parte Bell*, 1 Glyn & J. 282, cited in 1 Roper on Hus. and Wife (32 Law Lib.) 354 n., that a voluntary settlement made by the husband, though set aside as fraudulent against creditors, prevents his wife's right of dower, cannot be taken as a decision upon the question, since it does not appear whether the settlement was made pending a marriage treaty. The *dicta* on this point are conflicting. Lord Chief Baron GILBERT is reported to have said that such a conveyance would be fraudulent as to the wife: 4 Cruise's Dig. 416; 1 Roper on Husband and Wife (32 Law Lib.) 354 n. In 1 Cruise 411 and in 4 Cruise 416, it is laid down that a secret conveyance by the husband in trust before marriage to defeat dower is void; and the whole doctrine as to ante-nuptial settlements by the wife is expressly applied to conveyances by the husband made under like circumstances. On the other hand, Lord HARDWICKE, in *Wannock v. Lifford*, Co. Litt. 208 a, note 1, also reported fully in Park on Dower 382, treats it as admitted, "that if a man before marriage conveys his

estate privately, without the knowledge of his wife, to trustees in trust for himself and his heirs in fee, that will prevent dower." Upon this authority Park on Dower 236 so lays down the rule. So also does 1 Washburn on Real Prop. 161. After the Statute of Uses, which converted all uses into legal estates and so admitted dower to attach to them, another mode of avoiding the inconveniences of dower was resorted to by the practice of settling jointures in lieu of dower. By a statute of Henry VIII., which was passed to remedy the inconvenient effect of the Statute of Uses as to dower, the husband was authorized to settle upon his intended wife, before the marriage, a jointure, which if reasonable, was held effectual as an equivalent for dower and barred it, even though made without the wife's privity, the courts of equity reserving the power to relieve the wife against a jointure unfair or merely illusory. Such, after much controversy, was the construction finally given to this statute in *Dury v. Dury*, 3 Bro. Parl. Cas. 492, cited in 1 Roper 477. The effect was that dower under the English system became a precarious, and in the case of large estates, an infrequent mode of provision for the wife; and, hence, its value as a marital right and the importance of protecting it was the less appreciated. Marriage was not presumed to have been contracted in expectation of it, unless upon representations to the wife that she would become entitled to it. This may account for what otherwise must appear as an unjust discrimination made by the English courts of equity in withholding from the wife such protection as is given to the husband against secret ante-nuptial settlements. Such a reason is suggested in the note to 1 Roper 354. But, in this country clearly the same reasons do not apply. Her dower is the only provision made by law for the wife out of the husband's real estate. Practically it is a most important resource, and the only form of provision out of real estate enjoyed by her except under wills. It does in fact to a large extent enter into the wife's expectations in contracting marriage, and properly so. It, therefore, ought to receive all the protection accorded to any marital right; to refuse it would, in this country, where jointures are unknown, render the right of dower precarious, if not wholly illusory.

In none of the American cases has this subject been thoroughly examined; but so far as they have gone they treat the wife's marital rights and their claim to protection as being on the same footing with those of the husband. In *Swaine v. Perine*, 5 Johns. Ch.

482, a conveyance was made by a husband before marriage with a view to defeat the wife's dower; the deed was to his daughter, was kept concealed for many years and possession did not go with it. After the husband's death the widow filed her bill for dower, and it was decreed to her, the deed being adjudged fraudulent as against her. It is true, that in a previous suit the deed had been held void as against a mortgagee claiming under a mortgage subsequent in date to the deed; but the widow was admitted to her dower not at all in consequence of the decree previously made that the deed was void as against the mortgagee. It was expressly declared to be fraudulent as against her also; and she would have been relieved quite as certainly had there been no previous controversy between the husband's representatives and another party touching the deed. It is also true that this was treated by the chancellor as a case of fraud *in fact*. It is then an authority for the relief of the wife against an ante-nuptial conveyance by the husband fraudulent in *fact*; but whether she should be relieved against a conveyance on the ground of mere non-disclosure is a question not decided in *Swaine v. Perine*.

To the same extent precisely is the ruling of *Petty v. Petty*, 4 B. Mon. 215. In that case a settlement by the husband on the eve of marriage, of all his property upon his children by a former marriage, was declared void so far as it affected the wife's dower in the real estate. It was a case of fraud *in fact* very gross in its circumstances, being in violation of express representations made to the wife before marriage in order to induce her consent. This case, like *Swaine v. Perine*, decides nothing as to the effect of mere concealment. It is, however, in one of its features a valuable recognition of the meritorious character of dower as a marital right, and of its claim to legal protection; for the wife was relieved upon a bill filed *in her husband's lifetime*, while her dower was inchoate only, the deed being adjudged void lest it should through delay become an impediment to her right of dower in the event of her surviving the husband.

Now, although in *Swaine v. Perine*, and *Petty v. Petty*, relief was given against fraud *in fact*, yet in weighing the effect of these decisions upon the case before us this is to be considered. They recognize the wife's dower to be a marital right, and as such a proper subject of protection in equity against a fraudulent ante-nuptial conveyance; placing it upon an equal footing in this respect

with the husband's marital rights. Then, with respect to the sort of fraud against which she should be relieved: whether it must be only what is termed fraud *in fact*, or whether she should be protected against *constructive fraud*, such as bare concealment, the same rule must apply in her favor which we have already seen has become settled for the husband's protection, viz., that constructive as well as actual fraud will invalidate an ante-nuptial conveyance.

Two cases at least have carried the protection of the wife thus far; one is *Cranson v. Cranson*, 4 Mich. 230. A husband, two weeks before his marriage, made a voluntary conveyance of his lands to his sons, with the design to exclude his intended wife. There was no misrepresentation to the wife, no positive deception; it was a case of mere concealment. The deed was held void on two distinct grounds, viz., the absence of a sufficient delivery, and also that "being executed secretly, for the purpose of cutting off the wife's dower, it was a fraud in law upon her rights accrued directly from the marriage." The other case of this class is *Smith v. Smith*, 2 Halst. Ch. Rep. 515. A husband, on the day of the marriage, but before it, without the wife's knowledge, settled property upon himself and a daughter by a former marriage, with intent to defeat dower. Actual misrepresentation was alleged by the bill, but denied by the answer; no proof to that effect appears; and the decision does not rest upon any such feature; but the chancellor assumes the broad ground that "a voluntary conveyance by a man on the eve of marriage, *unknown to the intended wife*, and made for the purpose of defeating the interest which she would acquire by the marriage in his estate, is fraudulent as against her. I see no sound distinction (he adds) between this case and the like conveyance by a woman under the like circumstances."

In 1 Scribner on Dower 561, there are cited to the same point *Littleton v. Littleton*, 1 Dev. & Bat. 327, and *Rowland v. Rowland*, 2 Sneed 543; but these cases I have not seen. Scribner refers to the American decisions as "not being entirely uniform;" and in 1 Washburn on Real Property 175, it is said that "the cases are singularly conflicting." On examination of the cases I find no conflict whatever as to the power of a court of equity to relieve the wife. It is only in courts of law where a legal seisin is essential to dower that the claim to it against the husband's conveyance prior to marriage has been denied, as in *Baker v. Chase*, 6 Hill 482.

The other case cited in Washburn as against the doctrine of *Swaine v. Perine* is *Jenny v. Jenny*, 24 Vt. 324. I have examined this case and think it not relevant to the question, though not having it by me I cannot state its circumstances. The rule to be derived from the equity decisions is that the wife's dower will be protected against the voluntary conveyance of the husband made pending a marriage engagement, under precisely the same circumstances in which the husband is relieved against an ante-nuptial settlement by the wife.

I am, therefore, of opinion that Mrs. Chandler is entitled to dower out of the real estate described in the deed of trust, notwithstanding the execution of the deed before her marriage, together with one-third of the rents and profits accrued since her husband's death. It appears from the answer that part of the real estate, a lot in Wilmington, has been sold by the trustee for \$400, its value. Assuming, as it is proper to do, that the purchaser was a *bona fide* purchaser, without notice, the court will not follow this lot into his hands; but the widow is nevertheless entitled as against the defendants to an assignment of such a share of the remaining real estate as she would have taken if the lot had remained in their hands; and, therefore, in assigning the dower, although it will be assigned only out of the remaining real estate, yet in estimating her share of that, the whole real estate, including the lot sold, will be considered.

II. It now remains to consider briefly the claim of the complainants to relief beyond the allowance of dower to the widow. The prayer is that the trust deed be declared *wholly void*; so that the real estate may descend under the intestate law and the personal estate be distributed, precisely as if no deed had been executed. This relief the court cannot decree.

A court of equity will not interfere to set aside a voluntary conveyance, because the conveyance disappoints hopes or expectations, however just and reasonable; not even because it violates obligations, if they are only natural or moral ones. Courts of equity as well as of law protect only legal rights and enforce legal obligations; legal, I mean, as distinguished from such as are merely *natural or moral*. For example, a promise, however solemnly made and binding in morals, if without a consideration, is not enforced in equity any more than at law; nor is the obligation of a parent to provide for children after his death. So, a conveyance will be set aside on

the ground of fraud, only when it is in fraud of some legal right and one existing at the time it is made. Now, in this case we may waive the fact that as to the infant complainant he was not *in esse* at the execution of the trust deed. It is a consideration decisive of the whole of this branch of the case, that even had William Chandler not conveyed his estate his marriage would have vested no rights in it nor have restricted his absolute control of it beyond the wife's dower in the real estate. He could *after* marriage have effectually disposed of his whole personal estate and of the inheritance of his real estate by just such a trust deed as this. It follows that his control of the property could not be less absolute *before* the marriage than *after* it; for, otherwise, an engagement to marry would be of more force than marriage itself. Besides, as any disposal of property before marriage which he could as freely have made after marriage defeated no right, but removed only a bare chance that the complainants might succeed to it if Chandler should continue to hold it and die intestate, the loss of such a chance cannot be treated as the disappointment of a just and reasonable expectation in marriage, nor as so altering the circumstances of the husband as to have influenced the decision of the intended wife. Again, it is clear that this deed would have stood against any attempt by Chandler to dispose of the personal estate and the inheritance of the real estate by another deed or by will. That he made no such attempt, but died intestate, so that, as it happened, these complainants would have succeeded to the whole property but for this deed, cannot affect the deed. A conveyance can be set aside only for causes affecting it when it is made, as for fraud then committed, or for the protection of rights then existing; its validity cannot be held in suspense, to be determined by future contingencies. This would subject titles to a distressing uncertainty.

But it was argued for the complainants that the deed being fraudulent in respect to dower is therefore *wholly void*, passing no title whatever, so that the heir at law may succeed to the real estate and the distributees to the personal estate as a consequence of the fraud on the right of dower, though they themselves might have no equity to set the deed aside. Such would be the effect if the deed were *illegal*; as where it violates the provisions of a statute which avoids the deed itself; it is then a nullity and stands in the way of

no claim which otherwise would be valid. And so, where a conveyance is tainted with fraud *in fact*, in which the parties claiming under it are implicated, such a conveyance is *wholly void*; for no effect whatever can be given to an instrument actually fraudulent; and, therefore, it is that, although a conveyance which is merely voluntary and not fraudulent in fact is invalid only against *existing* creditors and not against *subsequent* creditors, yet if the conveyance is tainted with actual fraud it is void altogether and subsequent creditors are let in. But such is not the effect of *constructive* fraud. The object of the doctrine of constructive fraud is to protect some right or interest, which in equity ought to be preserved, against the effect of a conveyance which is in other respects valid; and, therefore, equity does not avoid the deed altogether, but saves against it the rights or interests which are to be protected. A deed containing some provisions or having some operation forbidden by statute or public policy, or contrary, as in this case, to some equity, is held invalid only so far as the statute or policy or equity requires, upon the principle *ut res magis valeat quam pereat*: *Bredin's Case*, 1 Rep. 76; *Shep. Touch.* 68; *Doe v. Pitcher*, 6 Taunt. 359; *Darling v. Rogers*, 22 Wend. 483. Thus a voluntary conveyance, if not fraudulent in fact, passes the title to the grantee, but subject to the rights of existing creditors, which are preserved by raising an implied trust in the grantee. See 1 Story Eq. Jur., sect. 371. So in this case the trust deed is effectual between the parties, but equity preserves the right of dower against the real estate in the hands of the grantees; precisely as at law dower follows real estate conveyed by the husband *after* the marriage, though the conveyance is otherwise good. It does not seem accurate to say that a deed is *void* for constructive fraud. The deed is valid; title under it passes, but subject in equity to those rights which are affected by the fraud.

Decree for complainant, Mrs. Chandler, in accordance with the foregoing opinion.

NOTE.—Since the above case was decided, the same principle has been adjudged by VAN VORST, J., in the Supreme Court of New York, in February 1875, in *Youngs v. Carter & Youngs*. and affirmed on appeal. The decision was that “a conveyance of property made by a husband before marriage, for no consideration other than that of filial affection, is fraudulent as against the inchoate right of dower of his wife, and is, therefore, void so far as such right is concerned.”